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No. 89-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

REXALL DRUG COMPANY,

Petitioner,

—v.—

ELIZABETH TIGUE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-168

REXALL DRUG COMPANY, *Petitioner,*

—v.—

ELIZABETH TIGUE, et al., *Respondents.*

PETITIONER'S REPLY BRIEF

Petitioner Rexall Drug Company ("Rexall") respectfully replies to Respondents' Brief in Opposition to Rexall's Petition for Writ of Certiorari to the Court of Appeals of the State of New York (hereinafter "Opp. Br.").[1]

THE WRIT SHOULD BE GRANTED

Respondents' opposition brief describes Rexall as "outraged" at the decision below. (Opp. Br. at 1) In this respondents are correct. Rexall is outraged that it is being held liable when Rexall did not cause respondents' alleged injuries; it is

1 Respondents' opposition brief consists of a response to Rexall's petition, Docket No. 89-168, bearing the caption *Rexall Drug Company v. Elizabeth Tigue*, and a response to the petition of E.R. Squibb & Sons, Inc., Docket No. 89-204, bearing the caption *E.R. Squibb & Sons, Inc. v. Mindy Hymowitz and Robert Abrams*. While respondents' opposition brief purports to respond to both petitions, it discusses only those facts that pertain to the claims made against Squibb by Ms. Hymowitz. Ms. Hymowitz has made no claims against Rexall, and Rexall shall not address those portions of respondents' opposition brief that relate solely to the *Hymowitz* case.

outraged that its due process rights have been ignored; and it is outraged that it is to be deprived of its property when it is not at fault or guilty of any wrongdoing with respect to respondents.

Now Rexall has further reason to be outraged. The opposition brief submitted by respondents grossly distorts Rexall's petition and glosses over the irrationalities of the decision below, all in an effort to defuse the fundamental constitutional issues presented by this matter. Particularly egregious is respondents' charge that Rexall has "seriously misstated" the "record". (Opp. Br. at 1). According to respondents, Rexall has improperly taken the Court of Appeals' criticism of the market share theory in general and applied it to the specific market share theory created by the court.[2] (Opp. Br. at 2-3) Nothing in the Court's opinion, however, even suggests that its recognition of the weaknesses and irrationalities inherent in every market share theory does not apply with equal force tc its own market share theory.

Respondents' distortions do not end here. In a further attempt to recreate the opinion below more to their own liking, respondents claim that the decision does allow DES manufacturers to "exclude" themselves from responsibility, and that the decision is thus not "unique" in the annals of American jurisprudence. (Opp. Br. at 9, 9 n.7)[3] We do not understand. The Court of Appeals expressly held that "there should be no exculpation." (App. at 13a) The dissent explicitly recognized that the majority's holding was "unnecessarily unfair and inequitable" because "*none* of the jurisdictions which have adopted varying theories of collective liability in DES cases" refuse to permit defendants to exculpate themselves. (App. at 21a-22a; emphasis added). The simple fact is that no decision in any case, DES or otherwise, so completely disregards a defendant's

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2 The criticism at issue is the Court's analysis that the market share theory does *not* provide a "reasonable link between liability and the risk created by a defendant to a particular plaintiff." (App. at 12a)

3 Contradicting themselves later in their brief, respondents admit that the Court's decision "hold[s] manufacturers liable even though they can prove in an individual case that they could not have made the DES which caused the injury." (Opp. Br. at 9)

fundamental right to be free from liability when it has affirmatively and conclusively established, as Rexall has here, that it could not have caused the alleged injury.

We shall not conduct a complete explication of the distortions in respondents' brief. The irrational and arbitrary decision below speaks for itself; it cannot be sheltered from criticism by respondents' artifice. Nor, as we discuss below, do the other issues raised by respondents obviate the need for this Court's careful review of that decision.

1. The Decision Below Is Final

Respondents argue that the decision below is not final because a trial will be held to determine Rexall's market share under the radical theory constructed by the Court of Appeals. (Opp. Br. at 6). The fact that there are to be further proceedings is irrelevant to determining whether an order is final for the purposes of 28 U.S.C. § 1257. Where the "federal issues"—such as the due process and supremacy clause violations presented by this case—are "conclusive," would not "be mooted or otherwise affected by the proceedings yet to be had because those proceedings . . . are wholly unrelated to the federal question," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 (1975), and carry the "serious public consequences" outlined in Rexall's petition, *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945), the decision is ripe for review by this Court. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

2. Rexall Has Preserved All the Constitutional Arguments that It Raised in Its Petition

Respondents suggest that Rexall has failed to preserve one of the several constitutional arguments it has presented for consideration by this Court. Specifically, respondents claim that Rexall belatedly raised the argument that an irrebuttable and unconstitutional presumption is created by the adoption of a radical theory of liability that imposes liability on Rexall when Rexall has shown that it did not and could not have caused the

alleged injury. (Opp. Br. at 12 and 12 n.10). Respondents have apparently not read Rexall's submissions below. Even the most cursory review of those briefs shows that Rexall advanced this argument not only in the Court of Appeals (App. at 41a, 46a), but in the Appellate Division (App. at 51a, 55a) and in the trial court (Supp. App. at 2a-3a). There can thus be no question that the issue has been properly preserved for this Court's consideration.

3. State Tort Law Must Comply with Fundamental Principles Embodied in Our Federal Constitution

Respondents further suggest that state tort law should not be subject to constitutional scrutiny. (Opp. Br. at 10-11) While Rexall agrees that deference should generally be accorded to a state's determination of its own tort law, that deference is not to be confused with uncritical obsequience. All state law must comport with the individual rights embodied in our federal constitution, and such law, whether legislatively or judicially created, cannot arbitrarily "impose burdens"—like those imposed on Rexall by the decision below—that are so clearly inconsistent with "due process of law". *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

4. The Arbitrary, Irrational Decision of The Court of Appeals Violates Due Process

Respondents argue that it is "rational" for the New York Court of Appeals to order Rexall to provide compensation to them even though Rexall did not manufacture the DES that allegedly caused them harm. (Opp. Br. at 7) Respondents seek to justify this result by arguing that, because Rexall manufactured some other DES, it is "fair" to impose liability on Rexall so that compensation will be provided to respondents. (Opp. Br. at 7-10)

We respectfully submit that there is nothing "fair" about taking an innocent party's property to pay for the wrongdoing of another. Indeed, the stated rationale of respondents, stripped bare of all its rhetoric, represents nothing less than a facile

use of the constitutionally unacceptable theorem that the ends justify the means. *Cf. Donnelly v. De Christoforo*, 416 U.S. 637, 650 (1974) (Douglas, J. dissenting). But neither that rationale nor the theory it purports to justify can possibly satisfy the due process test set forth in *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 90 (1935). To begin with, the means used "are unnecessary or inappropriate to the proposed end", *id.*,—relief could have been provided to respondents by adopting a less draconian theory that permitted exculpation; second, as we demonstrated in Rexall's petition, the means chosen arbitrarily ignore Rexall's "recognized rights to enjoy . . . property." *Id.* No one, whether they be prince, pauper or pharmaceutical manufacturer, can be subjected to the claims of another without fault or liability because to do so violates the "most rudimentary concept of due process." *Giaccio v. Pennsylvania*, *supra*, 382 U.S. at 405 (Stewart, J. concurring). *See also State Use of Maine v. A/S Nye Kristianborg*, 84 F. Supp. 775, 780 (D. Md. 1949).

5. The Cause of Action Created By The New York Court of Appeals Violates The Supremacy Clause

Respondents claim that Rexall's preemption argument fails because liability is not being imposed on Rexall solely by reason of its FDA approved marketing of DES. (Opp. Br. at 13-14) The Court of Appeals opinion, however, explicitly holds that "culpability" attaches to Rexall and other DES manufacturers simply because of their status as marketers of "DES for use during pregnancy." (App. at 12a) No more is required under the Court of Appeals' scheme, and the imposition of liability for that status alone, a status that the FDA specifically authorized, violates the supremacy clause. *See Pharmaceutical Society of State of New York v. Lefkowitz*, 585 F.2d 953 (2d Cir. 1978).

CONCLUSION

On the basis of the foregoing argument and authorities, and pursuant to Supreme Court Rule 17, petitioner respectfully requests that its petition for certiorari be granted.

Dated: New York, New York
October 12, 1989

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

New York Supreme Court

COUNTY OF NEW YORK

Index No. 03838/76

Justice Gammerman

ELIZABETH TIGUE, BARBARA TIGUE, SAYRE MARGOLIES, as Administratix of the Estate of MYRNA MARGOLIES,

Plaintiffs,

—against—

E.R. SQUIBB & SONS, INC., et al.,

Defendants.

MEMORANDUM OF LAW, IN SUPPORT OF DEFENDANT REXALL DRUG COMPANY'S MOTION FOR SUMMARY JUDGMENT

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Imposition of Liability Without Product Identification Violates Procedural Due Process Because it Creates an Irrebuttable, Irrational and Unreasonable Presumption of Causation.

Further, the presumption of causation created by these types of theories is irrational. A presumption that a defendant made the DES to which any individual plaintiff was exposed is not rational in view of the hundreds of manufacturers of the product. Yet, that is precisely what these theories demand by imposing liability not upon proof of causation, but upon the basis of aggregate market share evidence, or participation in the industry. A presumption must be "universally true in fact" in order to be valid under the due process clause. *Vlandis v. Kline*, 412 U.S. 441, 446, 452 (1973). An unreasonable or irrational presumption, on the other hand, violates due process. *Leary v. United States*, 395 U.S. 6, 36 (1969).

* * *

CONCLUSION

On the basis of the foregoing, the defendant Rexall Drug Company respectfully requests that the Court grant its Motion for Summary Judgment, dismissing each and every claim asserted in Plaintiffs' Amended Complaint.

October 30, 1986
New York, New York

Respectfully submitted,

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